



COMMODITY FUTURES TRADING COMMISSION

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90-9

DIVISION OF
TRADING AND MARKETS

June 5, 1990

Re: Request for No Action Position

Dear

This is in reference to your letters to the Division of Trading and Markets ("Division") dated March 26, 1990, and April 23, 1990 on behalf of _____, in which you requested that the Division confirm that it will not recommend that the Commodity Futures Trading Commission ("Commission") initiate an administrative proceeding against _____ if _____ London, England branch office ("London branch") does not furnish its non-United States customers with the risk disclosure statement prescribed by Commission rule 1.55. ^{1/}

In your March 26, 1990 letter you have stated the following:

_____ a wholly-owned subsidiary of _____, is registered with the Commission as a futures commission merchant ("FCM") and maintains a branch office in London, England. In this connection, _____ is a member of the Association of Futures Brokers and Dealers ("AFBD") and its London branch is subject to the rules and regulations of the AFBD. In particular, the London branch is required to give each customer, all of which are non-U.S. institutional customers, a risk disclosure statement prescribed by AFBD Rule 5.45.1. Although somewhat longer than the risk disclosure statement prescribed by Commission Rule 1.55, the AFBD statement contains all of the disclosures in Rule 1.55.

We understand that the Division has previously assumed, without discussion, that an FCM must furnish a copy of the Rule 1.55 risk disclosure statement to every customer, including customers not located in the United States [("U.S.")]. This position was adopted when few, if any,

^{1/} 17 C.F.R. §1.55 (1989).

foreign countries regulated the offer and sale of futures contracts to their citizens. Under those circumstances, it was not inappropriate to expect that foreign branch offices of U.S. FCMs would give their customers the same disclosures that U.S.-based customers received.

Since then, however, many countries have adopted comprehensive regulatory schemes to govern the offer and sale of futures contracts, including prescribing the risk disclosures that must be made to customers located in, or solicited from, that country. As you know, the United Kingdom is one such country.

As noted earlier, the AFBD has prescribed a risk disclosure statement not unlike the disclosure statement prescribed by the Commission. Indeed, it is clear that the AFBD modeled its statement after the Commission's, enhancing it to include those additional disclosures that the AFBD concluded were the minimum that its members must provide their customers. Under these changed circumstances, we believe that no regulatory purpose is served by requiring a London branch of a U.S. FCM to furnish its [non-U.S.] customers with a Rule 1.55 risk disclosure statement in addition to that prescribed by the AFBD. The adoption of the no-action position we are requesting, therefore, is appropriate and, moreover, is consistent with the principles of international comity.

As you know, the Commodity Exchange Act ("Act") and regulations promulgated thereunder establish a comprehensive regulatory system for ensuring customer protection and market integrity. Generally, no distinction is made in the treatment of U.S. and non-U.S. customers of U.S. FCMs in the application of these rules. Specifically, rule 1.55 applies to FCMs in their dealings with any customer, U.S. and non-U.S. Your March 26, 1990 letter, however, requests confirmation that the Division will not recommend enforcement action against _____ if _____ London branch fails to provide its customers, all of which are non-U.S. institutional customers, with the risk disclosure statement in Commission rule 1.55. The Division has carefully considered your letter and has determined, for the reasons and subject to the conditions set forth below, that it will not recommend that the Commission take enforcement action against _____ if the London branch does not furnish its non-U.S. customers with the risk disclosure statement prescribed by Commission rule 1.55.

We have reviewed the relevant disclosure statement and concur in the assessment noted in your March 26, 1990 letter that the risk disclosure statement required by AFBD Rule 5.45.1 contains all of the disclosures contained in the Commission's rule 1.55 risk disclosure statement, as well as certain additional disclosures that the AFBD has determined to be

necessary. ^{2/} In your letter of April 23, 1990, you have confirmed that AFBD Rule 5.45.1 requires that the disclosure statement prescribed therein be provided to all customers of the AFBD member, including "business investors" and "professional investors," notwithstanding certain distinctions otherwise permitted in the treatment of different classes of customers under the rules of AFBD. ^{3/} You further note, however, that paragraph (b) of that rule provides that _____ London branch is not required to receive a signed acknowledgment if _____ reasonably believes that the customer is such a business investor, experienced investor or professional investor, and the customer has read and understood the statement. Notwithstanding this provision of AFBD Rule 5.45.1, you confirm in your April 23, 1990 letter that if the requested relief is granted, _____ will obtain a signed acknowledgment from each customer with respect to the risk disclosure statement. In addition, you note that under the AFBD rules, ^{4/} such an acknowledgment must be retained for a period of three years from the time the person ceases to be a customer of the AFBD member firm. ^{5/}

^{2/} The additional disclosures contained in the risk disclosure statement required by AFBD Rule 5.45.1 are not inconsistent with the disclosures contained in the Commission's rule 1.55 risk disclosure statement.

^{3/} Specifically, Rule 5.45.1 provides, in part, that

a member firm shall not effect with or on behalf of a customer or advise or procure a customer to enter into a transaction . . . unless . . . the member firm has, before the transaction is effected or the advice given, delivered to the customer a written Risk Disclosure Statement

^{4/} See AFBD Rules 5.25 and 5.26.

^{5/} The period of retention of the acknowledgment required in connection with the disclosure statement prescribed in Commission rule 1.55 is set forth in Commission rule 1.31, which provides in part that:

All books and records required to be kept by the [Commodity Exchange] Act or by these regulations shall be kept for a period of five years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period. All such books and records shall be open to inspection by any representative of the Commission or the U.S. Department
(Footnote Continued)

The Division believes that in circumstances such as this where the AFBD's requirements are similar to those set forth in rule 1.55, and _____ London branch will be providing the AFBD's risk disclosure statement to non-U.S. customers, the enforcement of the risk disclosure rules of both the AFBD and the Commission would be duplicative.

Under these circumstances, the Division finds no significant regulatory benefit to be derived by requiring _____ London branch to also provide the rule 1.55 risk disclosure document. Based upon the foregoing, in particular, the undertakings of _____ as set forth in its letters dated March 26 and April 23, 1990, the Division will not recommend enforcement action against _____ if: (i) in lieu of furnishing its non-U.S. customers with the risk disclosure statement prescribed by rule 1.55, the London branch provides each such customer with the risk disclosure statement prescribed in AFBD Rule 5.45.1; and (ii) the London branch maintains the customer acknowledgments which _____ has undertaken to obtain from all of the customers which are the subject of this no action request in accordance with the period specified in AFBD rules 5.25 and 5.26 in lieu of the provisions of Commission rule 1.31. This no action position, however, is limited to _____ London branch and does not provide relief to your client from any other provisions of Commission rule 1.55, including, without limitation, rule 1.55(d). 6/

The position set forth in this letter is based upon the facts set forth in your March 26, 1990, and April 23, 1990 letters. Any different, changed or omitted facts might require us to reach a different conclusion. In addition, the views set forth herein are solely those of this Division and do not

(Footnote Continued)
of Justice.

As a registered FCM, _____ would be required to provide the Commission and the Department of Justice with access to its books and records, including the acknowledgment of receipt of the AFBD's risk disclosure statement which _____ has confirmed it will obtain from all of its non-U.S. customers.

6/ As you noted, the Commission has taken the position that persons acting in the capacity of associated persons with respect to non-U.S. customers in an FCM's foreign branch office need not register with the Commission. See 45 Fed. Reg. 18356 (March 20, 1980); 45 Fed. Reg. 80485 (December 5, 1980). However, this position does not provide a general exemption from other customer protection requirements applicable to FCMs with respect to their non-U.S. customers.

necessarily represent the views of the Commission or those of any other unit of the Commission.

Very truly yours,

Andrea M. Corcoran
Andrea M. Corcoran
Director